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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 MARGIE CHERRY and ESTORIA CHERRY,  
11 on behalf of themselves and all others similarly  
situated,

No. C 04-04981 WHA

12 Plaintiffs,

13 v.

14 THE CITY COLLEGE OF SAN FRANCISCO  
15 (“City College”) LAWRENCE WONG, in his  
16 official capacity as President of the Board of  
17 Trustees, MILTON MARKS, III, in his official  
18 capacity as Vice-President of the Board of  
19 Trustees, DR. NATALIE BERG, JOHNNIE  
RAMOS, RODEL E. RODIS, in their official  
capacities as members of the Board of  
Trustees, and DR. PHILIP R. RAY, JR., in his  
official capacity as Chancellor,

20 Defendants.

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**ORDER GRANTING  
PLAINTIFFS’ MOTION TO  
AMEND AND PLACING CASE ON  
BENCH TRIAL CALENDAR**

In this action brought under the Americans with Disabilities Act to improve access to the City College of San Francisco’s programs and services, the immediate issue is whether plaintiffs’ waiver of damages dispenses with the need for a jury trial notwithstanding the objections of the defendant.

**STATEMENT**

On November 23, 2004, plaintiffs commenced this action against City College of San

1 Francisco seeking declaratory and injunctive relief, in addition to compensatory damages. In  
2 their answer defendants requested a trial by jury. A jury trial is scheduled for February 13,  
3 2006. On January 10, 2006, however, plaintiffs filed a "notice" stating that plaintiffs waived  
4 their damage claims. Defendants responded with a motion to strike the notice and to maintain  
5 the action on the jury calendar.

## 6 ANALYSIS

7 As a preliminary matter, the notice by plaintiffs will be treated as a motion to amend the  
8 complaint to delete the damage request. This will place the matter in the proper procedural  
9 context. The scheduling order provided that any motion to amend must have been brought by  
10 March 4, 2005. Plaintiffs' motion is well after that deadline. As such plaintiffs must show  
11 good cause under Rule 16(b).

12 This order finds that good cause to amend exists. The trial of this case will prove to be a  
13 protracted and bone-crushing exercise. This is because there are 4,180 ADA and Section 504  
14 alleged violations. In most cases the issue will turn on whether or not the measurements exceed  
15 the specified ADA Accessibility Guidelines for Buildings and Facilities measurements, taking  
16 into account tolerances. This will be an extremely difficult case for a jury to track evidence in  
17 even taking into account innovative methods the Court plans to use. Subjecting a jury to this  
18 prolix and excessively tedious exercise will be unnecessary if the claim for damages is deleted.

19 On the other hand, this Court recognizes prejudice to defendants. Defendants have been  
20 preparing as if this case were going to be tried by a jury. This prejudice can be remedied,  
21 however, by conditioning the amendment on having plaintiffs and/or plaintiffs' counsel pay all  
22 reasonably related attorney's fees related to these issues. For example, if defense counsel have  
23 presented the case to a mock jury, then the expenses so associated would be recoverable. An  
24 accompanying order will set a procedure to determine the amount of fees and expenses.

25 The amendment now having been permitted, Rule 39(a)(2) allows "the court upon  
26 motion or of its own initiative" to determine whether or not a right to a trial by jury exists  
27 "under the Constitution or statutes of the United States." This order now finds that there is no  
28 right to a jury trial, because only declaratory relief, injunctive relief, and attorney's fees remain,

1 all equitable issues. Therefore, this action should be tried to the Court.

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3 This order recognizes contrary authority as well as consistent authority with the above  
4 reasoning. The Ninth Circuit has not yet ruled on the proper mode of analysis for the foregoing  
5 problem. This order finds persuasive and has therefore followed the Fourth Circuit's approach  
6 in *Francis v. Dietrick*, 682 F.2d 485 (4th Cir. 1982). On appeal from the district court, the  
7 defendant in *Francis* alleged that the district court had failed to consider Rule 39(a) in granting  
8 the plaintiff leave to amend and subsequently converting the trial from a jury to a bench trial.  
9 In affirming, the Fourth Circuit stated that the plaintiff's "amended complaint brought the  
10 action within the purview of [R]ule 39(a)(2), which . . . authorizes the court to proceed without  
11 a jury when it finds that the right to a trial by jury does not exist for the issues presented by the  
12 pleadings." *Id.* at 487. This is the approach followed by this order.

13 On the other hand, a different approach was taken in *Abbott v. Bragdon*, D.M.D., 893 F.  
14 Supp. 99 (D. Me. 1995). In *Abbott*, the plaintiff's original complaint included a request for  
15 damages. After the defendant requested a jury trial, the plaintiff sought leave to amend to  
16 delete the damage claim. In citing a series of admiralty cases, the court reasoned that Rule 39  
17 must come before the Rule 16(b) or 15(a) analysis and "pursuant to [Rule] 39(a), Defendant's  
18 refusal to consent to such an amendment bars Plaintiff's request." *Id.* at 101–02. This order  
19 disagrees with the approach taken in *Abbott*. The threshold issue should be whether to allow  
20 leave to amend. If leave to amend is granted, and the issues for which the right to a jury trial  
21 existed are eliminated, Rule 39(a) then allows the case to be tried as a bench trial without a jury.

22 As indicated, a similar issue has arisen in admiralty-related actions. Illustrative is  
23 *Diotima Shipping Corp. v. Chase, Leavitt & Co.*, 102 F.R.D. 532 (D. Me. 1984). In *Diotima* the  
24 plaintiff alleged diversity jurisdiction and sought damages. The defendant properly demanded a  
25 jury trial. After pretrial conference the plaintiff sought leave to amend its complaint to change  
26 the basis of jurisdiction to admiralty. The plaintiff did not seek to change the nature of the  
27 remedy sought. The court declined to allow the plaintiff leave to amend the basis for  
28 jurisdiction. *Id.* at 535. Here, unlike in the admiralty cases, plaintiffs' amendment alters only

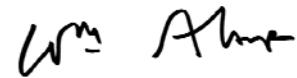
1 the nature of the remedy sought. Withdrawal of the claim for damages leaves only equitable  
2 issues. Jurisdiction is not affected.

3 **CONCLUSION**

4 For these reasons, this motion is **GRANTED**. The case will proceed as a bench trial.  
5 Plaintiffs and plaintiffs' counsel are jointly and severally liable for any reasonable fees and  
6 expenses incurred by defendants in reliance on the preparation for a jury trial.

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8 **IT IS SO ORDERED.**

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10 Dated: January 31, 2006



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12 WILLIAM ALSUP  
13 UNITED STATES DISTRICT JUDGE  
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